Some Remarks on Advocacy In Civil Cases

Being a Conference with the
Junior Bar Association of Montreal

BY

ALBERT W. ATWATER, K.C.
Batonnier of the Bar

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Some Remarks on Advocacy

WHEN you did me the honor of inviting me to deliver a lecture, I am afraid I was rather rash in accepting, as I found after doing so that I had some difficulty to think of a subject upon which I could pretend to speak with any authority, or one upon which you had not much more recently than myself had the advantage of lectures from those who had made a study of the different branches of the law and of the reading which goes with an academic course.

I therefore hope that you will not consider the remarks which I now have the privilege of making to you as in any respect a lecture, but merely as hints or suggestions in connection with the advocacy and trial of civil cases based on the observations and conclusions resulting from a somewhat long practice.

Let me say at the outset that I greatly fear that advocacy as a science is not being as carefully studied and lived up to at our Bar as it ought to be. The deterioration is perhaps the inevitable consequence of the multiplicity of duties which a lawyer is called upon to perform under a system in which he must combine the qualities—to use the terms of our certificates to practise, or at least of those which prevailed at the time of my admission—of advocate, barrister, solicitor, attorney and proctor at law.

The commercial side of our profession is thrust too much upon our time and attention to enable us to devote the care which the advocate ought to bestow upon the actual work of litigation which it is his duty to attend to. Too often pleadings are prepared too hurriedly and with not enough attention to detail or sufficient eye to the evidence and argument which must be brought forward in support of them, evidence is not carefully enough marshalled in advance of the trial, and, as a consequence, too little real help is given to the Court upon which the unnecessary duty is cast of endeavoring to extract truth from falsehood from a mass of pleadings and evidence much of which is irrelevant to the real issue.

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The result is to contribute materially to delay in the effective administration of justice and often to do injustice through no fault of the Court.

I sincerely believe that a division of the profession into those who should attend to what may be termed the office or solicitors' work and those who should devote themselves to the science of advocacy would be of benefit to the profession as well as to the community and greatly help the Courts in the effective administration of justice.

Upon the conduct of a case whether on behalf of the Plaintiff or Defendant, very often depends its success or failure. The art of advocacy is probably as old as the science of the law. I do not mean by advocacy the mere oral arguments which may be addressed to a tribunal, but I include in the word all those incidents to a dispute including the pleadings or written statements of both parties, the proof that must be adduced in support of them, the examination and cross-examination of the witnesses who are called on each side and the final summing up and presentment of the claims of both parties to the tribunal.

In the early history of civilization, no doubt, justice was dispensed with very little regard for an observance of any fixed rules either as to the statement of the claims of contending parties or of those which should govern the adduction of evidence in support of these claims. In one form or another the dispenser of justice was the supreme head of the state and had very large discretionary powers in the administration of justice. Complaint and defense were oral, and impromptu testimony, such as it was, was adduced on the spot and summary justice administered, as it appeared advisable to the acting Judge. The Cadi, so to speak, sat at the gate and dispensed justice or injustice as it suited him best.

That the testimony of witnesses under some form of oath must have been regarded as an essential feature of a prosecution or of a dispute antedates the time of Moses and was probably borrowed by him from the Egyptians, is, I think, evidenced by the importance attached to the giving of false evidence by including its inhibition amongst the commandments, the bearing of false witness against one's neighbor being forbidden as equally abhorrent to the Almighty as other crimes which in these days are regarded apparently, if we judge by the scale of punishment, as of greater consequence.

Solomon, with all his wisdom, does not seem to have always had regard to rules of evidence, if we are to believe the recorded cases of his decisions. The incident of the dispute as to the ownership of the baby may illustrate his wisdom in supplying practical tests of the truthfulness of opposing witnesses, but, I fear, would hardly be accepted as a precedent in a modern Court.

For the protection of society however, it has been found necessary by all civilized communities to establish definite rules of pleading, practice and trial, and the strict observance of these rules is best calculated to the enforcement of the laws and the adjustment of disputes.

The law applicable to any clearly defined statement of facts, is as a rule easy to determine. It is in ascertaining what are the facts that the difficulty generally arises.

I do not think I exaggerate when I say that in modern times, and particularly in countries whose commercial life is so active as is that of most of the civilized world to-day, seventy-five per cent of the cases which come before the Courts depend for their decision upon issues of fact and fact only. How many cases are there which would fail on an inscription in law which, of course, admits the truth of all the Plaintiff's allegations, how many defenses are there which would be similarly dismissed, and if the action or defense is not so demurrable, then it must follow that the Plaintiff has a good case if it is proved, or correspondingly, that the Defendant has a good defense if it is proved, and as both sides cannot be right if they contradict each other on any given question of fact, the issue becomes one of fact and when one side or the other has made good its case, as a rule the law applicable to the facts thus established is comparatively simple of ascertainment.

There is no part of the practice of his profession therefore, which is more important for a lawyer to understand than the method of so presenting his case to a Court or to a jury as to convince that Court or jury that his client is right *in fact* and, to obtain a finding on the facts in his favor. The law will, so to speak, take care of itself, and in some cases might even be left to the Judges to apply, with little, if any, unnecessary argument. The great effort therefore, of the advocate should be so to prepare his statements of facts and so to marshall his evidence and so to meet the countervailing testimony of his adversary either by cross-

examination or by direct testimony as to bring conviction that the facts are as he represents them.

Let me commence with the pleadings, because they contain the statement of the facts upon which you rely. They should contain no arguments or legal propositions. The facts should be set forth in as clear and concise language as possible, and superfluous phrases eliminated. Statements of fact which are not pertinent to the issues, which are not necessary in a declaration to entitle a Plaintiff to judgment or in a defense to defeat the Plaintiff's claim should be omitted. To put them of record, even if they are not demurred to, will in the end only embarrass yourself. You are faced at a trial with the necessity of either abandoning them or of endeavoring to make proof of them and when proved they are useless, cumbering the record unnecessarily, unduly prolonging the trial and possibly, as I shall endeavor to point out later, making difficulties by exposing your witnesses to being cross-examined on points which are of no importance to you, and which you may possibly fail to satisfactorily prove.

The effect, on a jury particularly, of a failure to satisfactorily prove a point which is of no importance is apt to seriously prejudice you and at best requires explanation. The effect on a Judge is generally of an irritating character which is not desirable for any reason. Therefore, I would impress on you again the advisability from the point of view of your own success and for the elimination of difficulties for yourself in the case to make your written pleadings as brief and as clear as possible, and to allege only questions of fact and those which it is essential for you to prove.

I hope you will not consider me too didactic if I have emphasized these admonitions because after all, the written pleadings are the commencement of the case and I have seen in more than one instance, references to them go far to determine a case, not only in the trial Court but in the tribunals of final appeal. *Omit nothing essential, but insert nothing that is superfluous.*

These written pleadings are as much a part of advocacy as any other part of the case, and their importance should not be overlooked.

In England, where the profession is divided into the two branches of solicitors and barristers, the former are entrusted with the preparation of these written pleadings and indeed with the preparation of the case until it comes to trial and the pleadings

in most cases are models of accuracy and conciseness in setting forth the pretensions of fact of the parties.

In many cases and, I think, in most cases of much importance, before the pleading is finally "settled," it is submitted to the counsel who is to be retained to try the case and he revises and approves or amends it according to his judgment.

In the hurry and multiplicity of duties which the advocate who combines the functions of solicitor and barrister, as under our system, has to attend to, he frequently has not the time to prepare his pleadings as carefully as is done under the English system, but as much thought as possible should be devoted at this initial stage of the proceedings to preparing them properly and to follow the lines in doing so which I have ventured to suggest.

The issue being joined, it is possible under our system to examine the adverse party on what is called discovery. This is a right which has been borrowed from the English system, but in a somewhat mutilated form. and it is a right which I think might be advantageously availed of to a greater extent than it now is for the purpose of shortening trials.

Our code prevents the exercise of this right by the parties until after a plea is filed. I can see no reason why an examination on discovery or an order to produce relevant documents should not be made, in the discretion of a Judge, at any time after an appearance. Such, I think, is the English practice and I do not think would prejudice a Plaintiff, considering the facility which is accorded by our code to either party to amend their pleadings once without leave and without costs before answer, but in any event a great deal of preliminary ground might be covered by these examinations which would save considerable time and unnecessary testimony at the trial besides enabling the attorneys engaged in the case to confine their preparation to such facts as might not have been admitted by the opposite party in his examination. Any document upon which either party relies should, I think, be produced at such examination and the opposite party should be required before the trial to either admit or deny it, unless, of course, it has been filed and specifically admitted by the pleadings.

Coming to the trial itself, I would in the first place, impress upon you the application of the same rules that I have referred to in regard to the preparation of the pleadings, namely, to confine

your evidence to what is essential to prove the truth of your allegations and not to introduce unnecessary or superfluous matter. The trial lawyer also ought to prepare carefully in advance and, if possible, memorize two things, first, the points that are essential for him to prove and secondly, by whom these facts are to be proved and what each of the witnesses who are to be called, will say. All facts which can be proved by documents should be eliminated from the oral testimony.

If it is at all possible, it is desirable not to rely only on the assurance of your client as to what a witness will say as we all know how treacherous such information sometimes is. Statements are very apt in passing from mouth to mouth to assume a very different appearance at the end from what they had in the beginning, and when your client, who is invariably an interested recipient of information which may be imparted to him by a possible witness, tells you that a witness will say a certain thing, it is by no means positive that he will say it just in the terms in which your client understands it, or that having said it, he will be able to stand up to a cross-examination upon it.

A witness should be interviewed, if possible, by the attorney and he should be subjected to more or less of a cross-examination so that the exact nature of his testimony may be arrived at. I do not mean, of course, that any suggestion as to his evidence should be made to him. That would be as improper as it would be probably fatal to his testimony under cross-examination, but it is in the interests of truth that a witness who is to testify should have his statements examined by a professional man whose mind should be kept as clear as possible from prejudice and should be able to appreciate between what would be immaterial, illegal or hearsay evidence, and what are the real facts of which the witness has a knowledge and about which only he should be asked.

Of course, in many cases, it is impossible to interview a witness in advance, and in such cases he should be called or not according to what is supposed to be his knowledge and how far it is a necessity to call him to testify to it.

As a rule if you can prove a fact clearly and decisively by the testimony of even one witness, it is better to rest on it than to call another who may be supposed to have a knowledge of the same fact, but whose testimony is uncertain or indecisive, or who would become confused under cross-examination. That would

leave you in the awkward predicament of possibly having to explain your own witness's inaccuracy or want of memory and cast a doubt on the testimony of your other witnesses.

Article 312 of our Code of Procedure embodies a principle which is common, I think, to most systems of law and evidence, that the evidence of one witness is sufficient. While this is true, it is hardly wise to confine your proof to the evidence of one witness, provided that you have two or more who can testify positively to the same fact, but it is wiser to rely on the one if he is clear and positive than to call more who may in any way contradict him on any material part of his evidence or about whose evidence you have any uncertainty.

Our Code of Procedure by way, I suppose, of discouraging a multiplication of evidence, penalizes with the costs of their depositions, witnesses in excess of three who are called to prove the same fact except with the permission of the Judge. I cannot imagine why three was selected as the number. When a fact is once proved, it does not really require to be doubly or trebly proved.

If you are acting for the Plaintiff do not anticipate the Defendant's evidence. Distinguish between what is necessary for your case on the assumption that your adversary has no evidence and what is strictly rebuttal.

I have seen much damage in my own experience done to a case by calling witnesses whose evidence was uncertain.

I remember particularly one case which was a trial before a jury where there was a direct question of fact between a Plaintiff (who was an injured workman and had taken an action for damages under the common law, not under the Workmen's Compensation Act, against his employer) and the foreman under whose charge he was at the time that the accident happened. The Plaintiff had sworn that he was acting directly under orders from the foreman or with his permission. The foreman swore positively that he had warned the Plaintiff and had refused him permission to go where he suffered the damage. A witness called by the Defendant to prove a minor fact, which I venture to think was not material to the case, disclosed the fact that the foreman had left or been discharged from the employ of the Defendant almost immediately after the accident and that he had been sought for and re-engaged only some two years later

and after the date of the trial had been fixed and the venire issued for the jury, a circumstance which enabled the jurors to come to the conclusion that the Plaintiff was to be believed rather than the Defendant's foreman. They gave a verdict accordingly.

As an illustration of a common class of cases which come before our Courts, I may take those which arise under the Workmen's Compensation Act. The evidence in all these cases should be extremely brief. The fact of the employment, the place, time and nature of the injury and the amount of wages being the only facts necessary to prove on the part of the Plaintiff and these facts might in most cases be admitted by the Plea.

There is no question of fault, unless, of course, an inexcusable fault is alleged. Incidentally, I may say that I have never been able to discover what these words in this Act mean, nor do I think they have ever received a satisfactory judicial interpretation. Fault is fault and I have never been able to reason out what an excusable fault was.

It is clearly the intention of the Act to take away the common law action based on *faute* and the common law defense thereto, but in the case of an inexcusable fault on the part of employer or employee, the common law is apparently revived, for there is no limit placed on the increase or reduction of the award which the Court in such circumstances may make. Some day we may perhaps get a definition of it which will be scientific. But this is a digression.

The order in which the witnesses are examined is of greater importance than is very often attached to it. I think it may be taken as a safe rule that the principal witness, that is, the one who has the most accurate knowledge of the facts which are sought to be proved, often the party himself, should be first examined Not only will this produce a better effect upon the Court, but it may save repetition or avoid the calling of subsequent witnesses to facts which he may have clearly proved and upon which cross-examination has not shaken him.

If a witness is to be examined on more than one fact, his evidence should be completed on one point before he is asked with regard to another. The method too, of examining a witness-in-chief is of much greater importance than many lawyers, even experienced ones, attach to it. It is too frequently taken for granted that a witness who is called on your own behalf knows

just what to say and will say it, and that it is only necessary to launch at him any sort of a question in order to produce a flow of such facts as will support the allegations of the party upon whose behalf he is called, and then if these facts are not forthcoming in exactly the order or substance which the examining counsel expects, the latter is tempted to interrupt or is possibly reduced to putting further and leading questions which, of course, provokes controversy and irritation on the part of the Court, the counsel and the witness, and probably tends to confuse the witness as well.

The effect, too, where there is a jury of such a method of examination is to leave them with the impression that the witness under examination is not very clear about his facts, which, of course, is helpful to your adversary. It must be remembered that no matter how accurately a witness may have stated what he knows outside the Court, unless he is a man of exceptional coolness, to find himself in the position of being called to testify to his knowledge under oath, knowing that every word that he says will be watched and he will be cross-examined upon it, his mind will be more or less confused and he will be reluctant to state in answer to a question anything more than the question calls for, or, if he becomes voluble and is desirous of answering without understanding the meaning of the question, he may indulge in a variety of information which may not help the case and be dangerous as providing useful material for your adversary to cross-examine upon.

In direct examination or examination-in-chief, the examining counsel should in advance prepare himself with as nearly as possible the form which his questions are going to take to be submitted to each of the witnesses who are called on his behalf.

Do not put any question which is unnecessary or which is not intended to elicit an answer in support of the allegation which you desire to prove. *In other words, do not put a question without a purpose.*

It is, of course, illegal in direct examination to ask leading or suggestive questions, that is, in effect to put into the mouth of the witness the answer that you desire him to give, so that it requires frequently considerable skill to elicit from even a friendly witness the actual facts which you wish to prove by him. For this reason, it is extremely advisable to think over and prepare the

questions which are to be submitted. If the witness is a man of intelligence and the question is clearly put, he is much more likely to comprehend it and to reply to it clearly than if the question is carelessly worded or if it requires a series of questions to elicit what he could have answered to one.

Once a witness has clearly testified to the fact which you desire him to answer, drop him on that point, do not worry him by coming back at him or think that it adds any emphasis or force to his statement by asking him to repeat it in another way. It not only does no good, but he may think that you are not satisfied with his first answer and try to put it in another form which though it may be the same thing, may in appearance be different. He may also become confused and qualify his first answer which may have been positive enough, with such statements as that it was "to the best of his recollection" or that he "thinks it was so."

Never worry your own witness if he is well disposed and has once testified to all that you expect him to state. There are, of course, cases of adverse witnesses. These, according to all rules of evidence, once their adverse disposition has been shown and by permission of the Court, may be asked leading questions and practically cross-examined in their direct examination, but it is a safe rule never to examine such a witness on your own behalf if a fact which you seek to elicit can be proved in any other way, and if your case must rest only on the testimony of such a witness and you know it, it is also a safe rule to, if possible, save your client from the trouble and expense of going into Court.

I know of a recent case for an amount where the action was taken for goods sold and delivered, of course, in excess of $50. There was no written agreement and the Plaintiff relied upon the proof of delivery but the only means by which he could prove this delivery was by the oath of the Defendant as the Plaintiff's employees who made the deliveries were not available. The Defendant refused to admit the receipt of the goods and the action failed.

Speaking of the rule against leading or suggestive questions, let me say that that rule is by the best authorities qualified to this extent that it is properly applicable only to such questions as relate to the matter at issue.

In unimportant matters or such as are merely introductory or explanatory, a great deal of time may be saved, without any real breach of the rule, by a comprehensive general question even though in form it may appear to be leading. There is nothing to be gained by making factious objections to a question, even 'hough leading in form, provided it does not embody a statement of fact which is in issue in the case.

In all cases in calling your own witnesses treat them with consideration; do not show impatience if their answers are not exactly at first what you wish them to be. If they have omitted anything which you think is material and which you think they have forgotten, try to elicit it by tact and perseverance but without requiring them to go over again what they have already sufficiently proved.

There are frequently cases where a thing or a fact which is indisputable will constitute your best evidence. Cases where, as the maxim has it, " Res ipsa loquitur." In such cases the rule which I have advocated of avoiding superabundant testimony is particularly applicable because you have the strongest testimony available in the thing itself.

If I may cite an example within my own experience which would illustrate my meaning: A railway engineer employed in the running of an engine on one of the Grand Trunk trains had been killed as the result of the explosion of a pipe in the cab of his engine. The explosion was due to the internal pressure of steam in the pipe in question. It was obvious that the pipe was not constructed for the purposes of bursting and that having done so it must have been due to one of two causes, either an inherent defect in its material or to a choking by some foreign substance due to lack of cleaning which was no part of the engineer's duty.

The action was at common law, by the widow, as the engineer's wages were above the limit of the Workmen's Compensation Act, and it was therefore, necessary to allege and prove fault. The attorneys for Plaintiff rested their case by proving the explosion, its consequences and the death of the engineer. We asked the Defendants to produce the section of pipe which had exploded and which had been cut out immediately after the accident, but it had in some mysterious way been lost.

The attorney of record was prepared to produce a number of expert witnesses who would have testified that the bursting of

the pipe could only have occurred from one of the two causes indicated and he was anxious to introduce this evidence. I took the responsibility of not putting it in and I know that my associate was sorely troubled in his mind lest I had been too rash in coming to this decision.

The case was tried by Mr. Justice Greenshields and a jury, and the Defendants, who were very ably defended, when we rested our case, moved, as I had expected, for non-suit on the ground of insufficient evidence.

The motion was denied and the Defendants were faced with the difficulty of suggesting some theory by which the pipe would have exploded other than through its defects or their want of care, a task in which they completely failed and we got a verdict and judgment for a satisfactory amount.

The case was carried to Review and confirmed.

It is, of course, a difficult matter to decide when to abstain from making evidence and when to make it, but if you are convinced that you have sufficient evidence to entitle you to a judgment, particularly when in accord with the silent testimony of the thing itself, it is wise not to run the risk of confusing your case and making unnecessary difficulties for yourself.

The attorney or counsel on the opposite side should during the examination of any witness follow closely not only the answers which the witness gives, but the form in which the questions of the examiner are put and he should be prepared to object and do so, when there is cause for it, but only when there is cause for it, and he should be prepared to justify and give reasons for his objection.

The main rules of evidence are so comparatively simple that any lawyer can easily familiarize himself with them and when the examining counsel fails to observe these rules, objection should be taken, but on no other occasion. There is too great a tendency, I think, in our Courts to make objection not because the question that is being put to the witness is objectionable in form or in law, but simply with the idea either that the objection will embarrass the witness or his counsel or perhaps from an irritable feeling that the evidence is going to be adverse to the objecting party.

In cross-examination particularly, there is, I think, too much latitude allowed by our Courts in the way of objections raised to

questions that are put by cross-examining counsel. They too often assume the form of an instruction to the witness which serves to put him on his guard and to defeat the whole purpose of the cross-examining counsel which he is entirely within his rights in seeking to give effect to.

Interruptions should, I think, be more strictly dealt with by the trial Judge than is frequently done, and the objection should be decided at once, not reserved for further consideration or to be dealt with by final judgment. This is particularly important in cases of trials by jury, but in any event, evidence is either legal or illegal and it is the duty of a Judge presiding at a trial to exclude it if illegal and to admit it only if legal.

Many of our records have been and are constantly cumbered with a great deal of evidence which should never have been allowed to become part of the record, and which if the case goes to appeal should never be printed, and yet, under the too generally prevailing system of reserving objections, it is impossible to exclude such evidence from a record.

I believe that in England and the other provinces of Canada which follow the English practice, objections are never reserved. If dismissed they are noted or they are maintained but they are always ruled upon at once.

There is one form of question which I may advert to briefly which is objectionable whether it occurs in a direct or cross-examination and which needs to be carefully guarded against, that is, the question which is really two questions in one, or which involves an assertion of fact coupled with a question to which a witness may unsuspectingly answer without discovering its full meaning, or which, knowing its meaning, he may answer truthfully and yet convey an impression of a different answer. Care should be taken that such questions are not slipped in as they frequently are by an adroit counsel. The questions put by your adversary should be analysed to see that nothing more is answered than appears on the surface. If an assertion of fact is coupled with the question, it is objectionable unless the witness has already stated the fact. Sometimes the question is not objectionable for this reason, but is so carefully drawn as to be limited in its scope, and if so, the witness should be pressed on cross-examination as to whether his answer has the full significance which it appears to have.

As an illustration, I may cite the case which actually occurred in our Courts of a manager of an institution who was asked the question if he had examined the Company's books *at the head office*. He replied that he had not, which was technically perfectly true. As a matter of fact he had examined the books, but *not* at the head office as they had been removed somewhere else for that purpose. The truth was not brought out in cross-examination.

That was a case where a close analysis of the form of the question would have enabled a cross-examining lawyer to put the witness in a very awkward light, but it apparently escaped notice.

I remember another instance where the witness, who was the Secretary of a large corporation, was required to identify some documents and the seal of the company. He was asked whether certain documents shown him bore the seal of the company. He answered, "No." He was then asked if he knew the seal of the company. He said he had never seen it and persisted in his statement.

It was only after some thought that the cross-examining counsel, happened to think that the seal and an impression of the seal were not the same things and the witness confessed that he had been answering with regard to the seal of the Company, whereas he was perfectly familiar with the impression of the seal, and admitted the ones that were submitted to him.

There is such a thing as being too truthful, and the Judge who was trying the case, did not hesitate to express his opinion of the witness's answers. The attorney on the other side afterwards admitted that they had their man a little overtrained.

I merely give you these instances to illustrate the meaning of my advice that you cannot be too careful in watching the terms in which a question is put, or in how you put it yourself.

CROSS-EXAMINATION

A great deal in many cases depends upon the way in which a witness is cross-examined and on what he says in cross-examination, as to whether it will be necessary to corroborate his evidence or not.

Mr. Wrottesley says that cross-examination must have been allowed in very ancient times, on the authority of Solomon, who

says: "He that is first in his own cause seemeth just, but his "neighbor cometh and searcheth him."

I would like to be able to give you some rules or even hints with regard to the best methods and practice of cross-examination, but I have never been able to find such rules myself or to get any real help thereon in concise form. I have come to the conclusion that a successful cross-examiner is something like the poet, he is born, not made.

One or two points which will help you very much, I have already referred to, namely, a close attention to the language of the witness-in-chief, and also a close attention to the form in which the questions were put which he had answered.

My own impression is that it is extremely seldom that a man will deliberately perjure himself, particularly in a civil case, and that is the only class of case of which I feel qualified to speak.

I am not like the subject of enquiry by the man who descended from a train at a country railway station and hurriedly asked the first man he met if he lived there and knew the place. His reply was that he did. The new arrival then said, "I am looking for a criminal lawyer. Have you got one here?" The reply which he received after some deliberation was, "Well, we think we have, but we have never been able to prove it on him."

The tendency of most men, I believe, is to tell the truth, but generally a witness who is called on one side or the other has a human tendency to do all he can fairly, to help the side which calls him. I do not, of course, speak of the parties to the case. He accordingly will perhaps unconsciously lay stress on the points which he thinks are most favorable to that side, and he will gloss over, or perhaps entirely omit to refer to other circumstances. He cannot very well be blamed for ignoring that part of his oath which calls upon him to tell the *whole* truth, because he probably thinks that the whole truth is limited to the questions which are put to him and that the Court and the lawyers ought to know better than he what that whole truth as regards the case is. He tells the truth as far as he goes, and nothing but the truth, but there may be numerous chinks which, if they were filled in, would give a different complexion to the whole story and it is just here where the faculty of a cross-examiner must come out.

The cross-examiner has got to have a certain imagination by which he can reconstruct in his own mind rapidly the story told by the witness and every incident which he has spoken to, and think what other facts there may be in reserve, if any, and these he must bring out.

I can perhaps give you one or two ideas of my own of what to avoid in cross-examination. The first is, if the witness has testified to something which you know to be true and which has been already proved, or you know will be proved *aliunde* (or which is immaterial to your case) do not cross-examine him at all. If he has made a statement which, even though immaterial, you know is incorrect or that you can contradict, cross-examine on it, because you may discredit his whole testimony by doing so. Second, do not repeat to him again the questions which he has already answered in chief, perhaps in a louder tone of voice and with a threatening aspect and reminders that he is on his oath. That only gives him an opportunity to be more positive and emphatic than he was at first and perhaps to think up some point against you which he has forgotten and which he is ready to swear to.

It was said once of a really eminent lawyer at the English Bar, who was not, however, a good cross-examiner, that his idea of cross-examination was putting over again every question asked in chief in a very angry tone and another eminent Judge on one occasion remarked to a counsel that cross-examination and examining crossly were not synonymous.

In actual practice a smooth style of cross-examination, taking the witness on to new ground, if possible, is much the most effective. Try to imagine the circumstances surrounding the facts to which he has testified, the position in which the witness may have himself been, and all the events leading up to the fact which he testifies to. If he has been speaking from memory, test his memory. Get from him place and circumstances as accurately as possible and at least you will probably succeed in uncovering any half-truths which he may have told and which are often more dangerous than a whole lie.

In dealing with the witness in cross-examination, keep him constantly before you; meet him eye to eye and put your questions so clearly and concisely that he cannot misunderstand you. You

are entitled to put leading questions to him and you should do so and not allow yourself to be perturbed by objections unless they are sustained by the Bench.

There is one class of witness whose cross-examination is difficult and that is what are known as expert witnesses. My own experience is, and I think that of most other lawyers who have had any experience in cases in which their testimony was introduced, that it is better to leave them alone as much as possible in cross-examination, but to call, if necessary, two for every one of their expert witnesses on your side who will testify directly the contrary of what the other experts testify. I think they can be found.

I think it was a certain learned Judge in the United States who divided untruthful witnesses into three classes: liars, perjurers and expert witnesses.

It is sometimes, however, advisable to cross-examine briefly for the purpose of showing that their conclusions are predicated upon a state of facts not in accord with what is in issue.

I remember one case which occupied the attention of the Courts here for some days where a great deal of medical expert testimony was called in. The action was one for damages taken by an elderly gentleman against the Tramways Company arising out of a collision in which he had been thrown down in one of the cars, and, as he alleged, had sustained a shock which caused the re-opening of an internal wound following an operation which he had submitted to some time before.

The theory of the defense was that his trouble was due to a natural re-opening of the wound which would have occurred in any event, and had not been caused or even accentuated by the shock of the collision. The Plaintiff rested his case on the evidence of the physician, Dr. Bell, then Chief Surgeon of the Royal Victoria Hospital, who had performed the operation and treated the Plaintiff subsequently, and of his assistant.

The Defendant's case had been prepared with very great care and with much attention to detail, and practically every prominent surgeon in Montreal was in attendance at the trial as a witness for the defense. The Defendant's counsel in cross-examination of Dr. Bell made him carefully describe the symptoms from which the Plaintiff had suffered and then proceeded to call

the different surgeons who explained with much elaboration and care to the jury that such symptoms would indicate in their opinion, imperfect healing and imperfect treatment of the wound.

I had not expected such evidence, as the Plea though sufficient to allow it to be made, did not disclose the nature of it, and I was faced with the alternative of either not cross-examining, which I felt would have had a very bad effect on the jury, or of finding myself lost in a mass of technical medical terms and parts of the hur body of which I knew absolutely nothing except what I hac rd from the learned gentlemen who had been in the box.

All the surgeons who testified were undoubtedly in perfectly good faith and were very eminent men in their profession, and I could not have hoped to have broken them down on their medical theories, but I did ask them one after the other whether they knew Dr. Bell, the operating surgeon, whose testimony had been given on behalf of the Plaintiff and what his character was. They gave him, of course, the highest professional character. I then asked whether even the most eminent surgeon did not sometimes make a wrong diagnosis. They admitted it might occur. I then asked them whether they would be prepared to swear that the cause of the Plaintiff's trouble was what they had said and that they were not wrong and Dr. Bell right. One after the other, with one single exception, they all declined to swear anything of the sort, and admitted that it was all theory and that Dr. Bell might very well have been right and had the best opportunities of judging as he had seen and treated the patient, and that was the end of the effect of their testimony which otherwise had been extremely interesting to the Court, the jury and a large audience.

The jury gave a unanimous verdict which was promptly given effect to by the Judge and subsequently unanimously confirmed in appeal.

I hope you will pardon me for referring to cases in which I may have been personally concerned. I only do so because I can speak of the incidents there with certainty and not as a matter of hearsay, so that you may know that even though not on oath, I am giving legal evidence.

I am satisfied that in the last case I have referred to had I attempted to cross-examine on scientific lines the jury would have become finally so confused that I could not have obtained a verdict.

I may perhaps be allowed to refer to another piece of expert testimony which I remember, in a case where a man had been killed by the bursting of an emery wheel. The defense was that it was due to his own fault in putting a tool or piece of iron against it for the purpose of sharpening it, which was the very thing it was intended for. The wheel was not strong enough to bear the number of revolutions which the machine to which it was attached made.

A very eminent scientific professor gave an hour's interesting lecture to the jury on how the wheel would never have burst if it had not been touched by the tool. He wound up by assimilating it to the case of a gun which was perfectly harmless until the trigger was pulled.

I remember the only question I asked in cross-examination was whether pulling a trigger would have exploded the gun if it had not been loaded. The eminent professor promptly replied, "Of course not," and the Plaintiff got a verdict.

The object of a cross-examiner should be either 1st, to get some facts from the witness which he has not disclosed in his examination-in-chief; 2nd, to weaken the effect of his testimony, particularly if he has testified with much positiveness, by testing his memory; or 3rd, to discredit him. If he has testified on a number of points, even though they are immaterial to your opponent's case, it gives you the greater opportunity to cross-examine, as if you can shake him on one point, you more or less discredit his testimony on all.

A close cross-examination of a witness on all the surrounding circumstances attending the matter upon which he has given testimony, will, if he is not telling the truth, often convict him out of his own mouth, but here is where your imagination has got to come in to a great extent and you must try to follow the working of the witness's mind. If he is telling a part of the truth only, such an examination with regard to collateral circumstances may elicit the whole truth and put a different light upon his testimony.

I would repeat, however, that an injudicious and ill-directed cross-examination is worse than no cross-examination at all, as it only serves to give the witness an opportunity to emphasize what he has already said. If you succeed in getting an admission in cross-examination which you think is useful to you, do not

return to the subject, get on to something else immediately. Your adversary may overlook it, or not see the importance of it, or he may forget about it by the time you have concluded,—and do not stop your cross-examination as soon as you have got it, as that also serves to draw attention to the fact which you have elicited, and do not show satisfaction at having obtained it. Keep that for your argument or address to the jury.

I am afraid I can give you no other suggestions in regard to cross-examination. What I have given are confirmed by the result of my personal observation and experience. I think, however, that an observance of the suggestions which I have tried to make may be helpful, but only experience is an effective teacher and some of the ablest lawyers have been very ineffective cross-examiners.

I think I need only say a word on the theory of re-examination. If your witness has not been affected by cross-examination it is probably best not to trouble him with any re-examination, but if he has been led into making a statement in cross-examination which you believe he did not intend, it is wise generally to ask him to explain.

Do not however, do it, as in a case which is said to have occurred in one of the English Courts where a man had given his testimony which was highly satisfactory to the party who had called him. The cross-examining counsel merely asked him one question, "Is it not true that you have been convicted of perjury?" giving the date and place, and on receiving an affirmative answer, of course, immediately declined to further examine him. The counsel who had called the witness in re-examination sought to restore his character by asking him, "Is it not a fact that you have several times been put on trial for perjury, but acquitted?"

These remarks have reached such a length that I fear they are becoming tiresome, but I cannot conclude without a few words on the final part of an advocate's duty before his case is left in the hands of the Court, that is the oral argument.

The days of oratory at the Bar I fear have disappeared, probably for the general good, though certainly it is a loss of many eloquent and moving orations which certain leaders of the Bar are still capable of making on occasion. The arguments of to-day which are most effective are those which are most closely reasoned and deal exclusively with the points at issue and in the

plainest and simplest language. They appear in fact to get drier and drier as the case mounts from one Court to another, till by the time they reach the Judicial Committee of the Privy Council, they partake of the character of almost whispered confidences imparted with diffidence into the ears of their Lordships during the intervals when counsel is allowed an opportunity to communicate his views.

If you are addressing a jury do not attempt to be declamatory. I am speaking, of course, always of civil cases. In criminal cases I believe the jurors are still swayed a good deal by the magnetism and power which is exercised by an eloquent speaker, but a jury drawn from amongst business people to try a civil case, which resolves itself into a pure question of dollars and cents, I can assure you is not influenced at all by any flights of oratory, and I doubt very much if they are materially influenced by a Judge's charge. They generally size up the evidence pretty accurately as it goes in and are ready to arrive at a conclusion without the help of counsel or court when the evidence is finished. If you impress them at all, it is by your close analysis of the evidence, by recalling to them the points which you think are proved in your favor and emphasizing them, and by dealing frankly with the evidence of your opponent and explaining or reconciling it with your theories. You must also impress them with the fact that you are earnest and sincere and that you believe absolutely in the truth of the statements which you ask them to find in your favor.

Any spirit of levity in addressing a jury is apt, I believe, to have a very bad effect and above all, never attempt to deceive them by representing a fact otherwise than as it has been absolutely established in evidence. You discredit your case and your other statements by so doing. If the jury do not perceive it, either your adversary or the Judge will certainly do so and your whole argument will go for nothing.

If your case is before a Judge be as brief as possible, and here particularly, any oratorical efforts are to be discouraged. The Judge has probably followed the evidence closely and has formed his own opinion on the facts, but you can, of course, recall his attention to those which you think are most important to you and you should also analyse your adversary's. Above all, if a Judge shows that he is with you, do not continue argument any further. He may evince his views by failure to take notice of your argument

or notes of what you say. This ought generally to be accepted as an indication that he is with you, but is too considerate to interrupt you, and it is fairly safe to stop, though it is not an infallible guide.

A case actually occurred in our Supreme Court where a young lawyer from the West, who was appellant in the case, was arguing a point which seemed somewhat elementary. Finally, the Chief Justice stopped him, "Surely, you do not need to argue that point longer. It seems to us to be elementary." He replied, "Well, that is what I thought in the Court below, and that is why I am here."

I do not, of course, venture to throw out any suggestions with regard to the conduct of cases on the part of the bench, but I do think that argument might more often than is the case be shortened by a Judge intimating to one counsel or other during the argument what his impressions of the testimony are so that the advocate against whom his opinion inclined should have an opportunity of meeting his difficulties and the other party might possibly be saved a needless argument. However, this is getting apart from my subject.

Where you are arguing in the trial Court or in any Court of Review or Appeal, never allow yourself to make statements of fact which cannot be absolutely substantiated by the record and do not fail to deal fairly and frankly with any evidence which may make against you. No case is of sufficient importance to justify an advocate in departing from what is due both to himself and to the profession of which he is a member. The word of a lawyer ought to be as sacred and as much to be relied upon as his oath, and a reputation for making accurate statements of the evidence is of great value to the pleader.

I fear that these remarks have been unduly protracted and possibly you may think that I have conveyed to you nothing new and very likely I have not, but at all events sometimes a condensation of knowledge which we already have when put into the ideas of another is useful even to the experienced practitioner.

The treatises of Mr. F. J. Wrottesley on the examination of witnesses and of Mr. Reynolds will be found useful as well as interesting in respect of the examination of witnesses, and I have to acknowledge their helpfulness.

Mr. Wellman's book on cross-examination is also interesting, particularly in the instances which it gives of cross-examination in actual cases.

In conclusion, let me emphasize the truth of the maxim "Sapiens omnia agit cum consilio," "A wise man does everything advisedly." Careful scrutiny of the facts before beginning an action will often prevent an eventual adverse judgment.

A reputation for keeping his clients out of litigation, or, if it is unavoidable, of being successful, is the best professional asset a lawyer can possess.